

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MALCOLM BUTLER,

Plaintiff,

v.

DAVID SCHOLTEN, et al.,

Defendants.

CASE NO. 1:19-CV-449

HON. ROBERT J. JONKER

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ORDER

The Court has reviewed the two Reports and Recommendation filed by the United States Magistrate Judge in this action on May 8, 2020 (ECF Nos. 91 & 92). Both of these filings were duly served on the parties. For the reasons that follow, the Court approves and adopts the Magistrate's Report and Recommendation with respect to Plaintiff's motions for preliminary injunction. The second Report and Recommendation will remain under advisement, pending the additional submissions the Court invites as set out below.

In the first Report and Recommendation (ECF No. 91), the Magistrate Judge recommends denying as moot Plaintiff's two motions for preliminary injunction since Plaintiff had already received the relief he requested in the motions: a refund for the amount he overpaid in filing fees. No objections to this Report and Recommendation have been filed under 28 U.S.C. § 636(b)(1)(C) and, accordingly, the Court adopts the Magistrate's Report and Recommendation.

The second Report and Recommendation (ECF No. 92) concerns Defendant's motion for summary judgment on the basis of exhaustion and Plaintiff's motions to strike / amend his responses to the defense motion. The Magistrate Judge recommends denying Defendant's motion

because Defendant presented no evidence that Plaintiff failed to exhaust his claim at the prison misconduct hearing. Defendant has filed an Objection (ECF No. 93) stating that any failure to present evidence was inadvertent given the various claims Plaintiff asserts against Defendant. Defendant contends, however, that the record indisputably shows that Plaintiff did not raise a retaliation claim during his misconduct hearing and, for that reason, requests the Court grant the motion. Plaintiff has responded to the objection (ECF No. 95) which asserts that there is a question of fact with respect to exhaustion.

The Court has reviewed the materials, including Plaintiff's Complaint and the documents attached to it. The Court does not find in them a basis for granting summary judgment on the basis of exhaustion at this stage, but is satisfied that both sides should have an opportunity to supplement their positions and provide any further supporting materials (such as affidavits from the hearing officer) with respect to exhaustion and the specific retaliation theory that remains in this case. The Report and Recommendation will remain under advisement pending these submissions.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation of the Magistrate Judge with Respect to Plaintiff's Motions for Preliminary Injunction (ECF No. 91) is **APPROVED AND ADOPTED** as the Opinion of this Court. Plaintiff's Motions for Preliminary Injunction (ECF No. 37 & 73) are **DENIED AS MOOT**.
2. The Report and Recommendation of the Magistrate Judge with Respect to Defendant's Motion for Summary Judgment on the Basis of Exhaustion (ECF No. 92) remains under **ADVISEMENT**.
3. Both sides shall have until **July 13, 2020** to supplement the record and file any additional supporting material with respect to the issue of exhaustion as framed by the

Magistrate Judge's Report and Recommendation. The parties may file a response brief to the other side's submission no later than **July 27, 2020**.

Dated: June 12, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE